



Third Party Extended Warranties and Service Contracts: Drawing the Line Between Insurance and Warranty Agreements

I. INTRODUCTION

For the average consumer, the purchase of a product seldom involves questions of insurance law. When purchasing tangible goods such as washers, dryers, and automobiles, consumers often rely upon product warranties by the seller to guard against possible future repair costs. However, in the past two decades manufacturers and retailers, especially of automobiles, have intensified the sale of product guarantees such as extended warranties and service contracts which lengthen the term of a product's usual guarantee.¹ Moreover, independent corporations which neither manufacture nor sell consumer products have begun to solicit third party service contracts to consumers. Such service contracts are intended to fulfill the purpose of an extended warranty by providing either actual repair or replacement or by offering financial reimbursement for the necessary repair or replacement of consumer products. Abuse in the sale and performance of product guarantees sold by third parties has come to the attention of both state and federal regulators. Legislative and administrative bodies have been concerned that third parties, who neither sell nor manufacture the guaranteed product, may fail to disclose essential coverage terms, refuse to cover expenses under the contract, or decline to provide adequate service for the product guaranteed.²

The increasing sales of third party product guarantees presents the legal community with significant issues involving consumer protection and insurance law. In order to offer insurance agreements, a corporation must possess a minimum level of assets and create a reserve fund from the insurance premiums which it collects. Moreover, all individuals who sell insurance policies must be registered as insurance agents by the state.³ Attaining compliance with insurance regulations is a costly task and presents an insurmountable hurdle to success for many entrepreneurs. As a result, many corporations which provide agreements amounting to product insurance take steps to characterize such contracts as warranties rather than insurance. The ability to be deemed a warrantor removes the wrath of the ominous insurance regulator and allows a

¹ Roger B. May, *A Special Background Report on Trends in Industry and Finance—Service Contracts for Automobiles Grow in Popularity*, WALL ST. J., Feb. 23, 1978, at 1.

² FEDERAL TRADE COMM'N, STAFF REPORT ON AUTOMOBILE WARRANTIES 84-108 (1968).

³ OHIO REV. CODE ANN. § 3905.01 (Anderson 1989).

product guarantee agreement to be enforceable under the contract and commercial laws of the state.

As one consumer article has indicated, "[e]xtended warranties are really insurance policies" and as a result similar policy problems that arise with insurance contracts face the unwary consumer.⁴ It has been estimated that companies who sell extended warranties and service contracts will spend between four and fifteen cents of each dollar collected for product service—the rest is profit.⁵ As was the problem with insurance companies prior to regulation, entities which sell product guarantees have no incentive to create a reserve fund which will cover their contractual obligations should they become insolvent.⁶ The inability to fulfill policy obligations was one of the prime rationales for instituting insurance regulation decades ago. Many states have allowed manufacturers and retailers of products to provide extended warranties under state law. However, third parties who are neither manufacturers nor retailers have realized the lucrative prospects of selling product guarantees.

In *Griffin Systems v. Ohio Department of Insurance*,⁷ the State of Ohio considered the status of third parties who neither manufacture nor sell consumer goods, but offer service contracts promising to repair products sold by others. In a surprising decision, the Supreme Court of Ohio held that third parties who were neither the seller nor manufacturer of a product, but who offered product guarantees covering defects within a product sold by others, were not engaging in the business of insurance. Rather, the court held that such corporations were offering warranty agreements.⁸

In examining *Griffin*, this Comment will explore the distinguishing elements of warranty and insurance agreements and examine the manner in which service contracts have been previously characterized and rationalized in Ohio and other jurisdictions. Further, this Comment will suggest that not only has the *Griffin* court misconstrued prior case law, but more importantly, the court has failed to sense the true public policy concerns of consumer protection that lay at the heart of insurance regulation.

II. PUBLIC POLICY

The insurance industry is subject to significant regulation primarily because "the whole value of the promise sold to the public by insurers lies in future

⁴ *Who Needs an Extended Warranty?*, 56 CONSUMER REP., Jan. 1991, at 21.

⁵ *Id.*

⁶ *Id.*

⁷ 575 N.E.2d 803 (Ohio 1991).

⁸ *Id.* at 807.

performance.”⁹ The insurer is liable on the policy only upon the happening of a fortuitous event. As a result, it becomes difficult for the insured to value the contract. A private individual’s access to information is limited and his potential for becoming the focus of financial abuse is inflated. The same dangers arise when third parties attempt to offer guarantee agreements for consumer products.

A second purpose for insurance regulation is the assurance of solvency. State insurance laws require a minimum level of financial backing and security prior to the operation of an insurance enterprise.¹⁰ States have created solvency guarantee funds from capital which is contributed by insurance companies—the failure to contribute capital to the solvency guarantee fund often results in the loss of authorization to undertake insurance business within the state. In addition to contributing to an insolvency fund, all states require the creation of a reserve fund consisting of liquid assets by the insurance company to cover potential liability.¹¹

The idea that providers of third party product guarantees should meet the same standards as those imposed upon the insurance industry may appear questionable on its face. However, the requirement is a necessary one. The fact that durable goods may call for frequent repair and maintenance is enough to require assurance of performance upon those who sell such product guarantees. The essence of a guarantee is the ability of the provider to fulfill his promise of future performance if called upon.

Individuals lack the ability to force third party corporations selling product guarantees to create reserve funds which would cover potential future obligations. As a result, when the guarantor fails to pay or becomes insolvent, the consumer’s choice is to seek legal damages for breach of contract or in the alternative, to seek recovery in bankruptcy as an unsecured creditor against the estate of the insolvent product guarantor.

The inability to check the financial backing of such guarantors forces consumers to embrace the *caveat emptor* line of reasoning with little alternative. All purchasers of third party guarantees are forced to investigate the background and status of the corporation offering the guarantee. Unfortunately, when a corporation is not required to file financial statements the ability to determine its true economic health becomes nearly impossible—especially if the enterprise is closely held.

⁹ ALBERT H. MOWBRAY ET AL., *INSURANCE: ITS THEORY AND PRACTICE IN THE UNITED STATES* 517 (6th ed. 1969).

¹⁰ See generally Spencer L. Kimball, *The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law*, 45 MINN. L. REV. 471, 480–82 (1961).

¹¹ *Id.* at 481–82.

III. LEGAL BACKGROUND

A. Insurance Contracts—The Distinguishing Characteristics

Not all jurisdictions have adopted a statutory definition of insurance.¹² In determining the distinguishing elements of insurance several jurisdictions have adopted the test promulgated by Professor Vance in 1951.¹³ Professor Vance proposes five elements necessary to constitute an insurance agreement: 1) the insurer must assume an insurable risk; 2) the insured must be subject to loss through the destruction or impairment of that interest by the happening of some designated peril; 3) the insurer must assume the risk of loss; 4) the assumption of risk must be part of a general scheme to distribute the actual losses among a large group of persons bearing similar risks; 5) the insured must pay a premium as consideration of the promise.¹⁴ The Vance definition of insurance has failed to create any bright line test and courts have utilized it merely to point themselves in the right direction.

In the seminal case of *Duffy v. Western Auto Supply Co.*,¹⁵ the Ohio Supreme Court established a judicial definition of insurance. The *Duffy* court held that an agreement to indemnify "against loss or damage resulting from perils outside of, and unrelated to defects in [an] article itself" was insurance.¹⁶ This particular definition limits the application of insurance to "perils" which are not related to manufacturing defects within the product. The *Duffy* definition of insurance appears to turn upon the magnitude of risk assumed by the insurer. The fact that an insurer agrees to indemnify the insured against a fortuitous event, that is, a loss resulting from an event over which the insurer has little or no control, has been a strong factor creating a presumption for the existence of an insurance contract.¹⁷

¹² Ohio is one example of a state which has failed to adopt a legislative definition of insurance.

¹³ WILLIAM R. VANCE, HANDBOOK ON THE LAW OF INSURANCE 1-2 (3d ed. 1951).

¹⁴ *Id.*

¹⁵ 16 N.E.2d 256 (Ohio 1938).

¹⁶ *Id.* (syllabus at para. 3); see also 44 C.J.S. *Insurance* § 1(b) (1945) (citing *Duffy*); *Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 69 P.2d 868, 869 (Cal. Ct. App. 1937), *rev'd on other grounds*, 77 P.2d 1084 (Cal. 1938) ("insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event"); *In re Hilpert's Estate*, 300 N.Y.S. 886, 890 (Surr. Ct. 1937) (insurance held to be "a simple contract whereby the insurer in return for a stated consideration agreed, upon the happening of a specified event to pay the insured a fixed or ascertainable sum of money").

¹⁷ N.Y. INS. LAW § 1101(a) (McKinney 1985).

The magnitude of risk assumed within an agreement is one element which distinguishes insurance from warranty contracts;¹⁸ however, it should not be the sole factor in characterizing a product guarantee agreement. A California court has held that the objective of a contract should also be evaluated in order to determine the character of the agreement.¹⁹ If the intent of a contract is merely to financially indemnify, that is, to make whole the victim of a loss in whole or in part by payment and nothing more, then the agreement raises a presumption of insurance character.²⁰

B. Warranty Contracts—The Buyer-Seller Privity Requirement

Courts have typically held that a warranty may arise only from a contract of sale²¹ and the lack of a sale will exclude the existence of an express warranty.²² Prior to *Griffin*, the Supreme Court of Ohio had defined an express warranty as “an affirmation of fact by the *seller* of a product . . . to induce the purchase thereof and *on which affirmation the buyer relies in making the purchase*.”²³ Moreover, under federal law a written warranty is specifically defined as “any written affirmation of fact or written promise made in connection with the sale of a consumer product *by a supplier to a buyer*.”²⁴

The existence of a buyer-seller relationship has been deemed crucial to the creation of an express product warranty agreement.²⁵ This relationship, or privity of contract, has been waived as a prerequisite to warranty claims only where such a requirement would produce a disastrous impact upon the public. For example, privity requirements have been exempted from strict product liability claims. The waiver of strict privity requirements for warranty agreements has become popular as an effective method of consumer protection, allowing parties who are not purchasers of the product but may be reasonably expected to use the product, to bring a claim against the manufacturer or retailer of a product if injury should occur.²⁶ However, as applied by the

¹⁸ Robert M. Kane, *The Service Contract and Product Service Warranty as an Insurance Contract*, N.Y. St. B.J., OCT. 1989, at 46, 48.

¹⁹ *Transportation Guarantee v. Jellins*, 174 P.2d 625, 628–29 (Cal. 1946).

²⁰ BLACK'S LAW DICTIONARY 769 (6th ed. 1990).

²¹ See 77 C.J.S. Sales § 302(b) (1952).

²² See *Lasky v. Economy Grocery Stores*, 65 N.E.2d 305, 307 (Mass. 1946); see also *F.M. Sibley Lumber Co. v. Schultz*, 297 N.W. 243 (Mich. 1941); G. Van Ingen, Annotation, *Law of Sales and Liability in Respect Thereof as Applied to Transactions in Self-Service Stores*, 163 A.L.R. 238 (1946).

²³ *Rogers v. Toni Home Permanent Co.*, 147 N.E.2d 612, 615 (Ohio 1958) (emphasis added).

²⁴ 15 U.S.C. § 2301(6)(A) (1988) (emphasis added).

²⁵ U.C.C. § 2-313 cmt. 1 (1990).

²⁶ *Id.*

Uniform Commercial Code ("U.C.C."), and numerous strict liability holdings, a waiver of buyer-seller privity should be the exception rather than the rule in determining whether a warranty agreement exists.²⁷ It is not difficult to understand the rationale behind a buyer-seller privity requirement in warranty contracts. One of the themes which appear in opinions requiring the existence of a buyer-seller privity is that a warranty agreement should not be permitted to indemnify against fortuitous events²⁸ arising from the promisor's lack of control²⁹ over the product covered under warranty.³⁰

The idea that product warranty contracts must be part of the basis of the bargain between buyer and seller has been a key factor considered by many courts in distinguishing contracts of insurance from those of warranty.³¹ If an agreement to repair, maintain, or to financially reimburse such costs is part and parcel to the sale of the product itself and promotes consumer confidence, the agreement is likely to be deemed incidental to the sale of the product and thus a warranty.³² However, when separate consideration is required for such an indemnity agreement, many jurisdictions have found the contract to be beyond the scope of a true warranty.³³ As an Official Comment to the U.C.C. states, "'Express' warranties rest on 'dickered' aspects of the individual bargain."³⁴ With warranty agreements, the focus has generally been placed upon whether the warranty was a dickered term in the contract for the sale of a product to the consumer. It becomes clear that a product guarantee agreement between parties

²⁷ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 97, at 690-91 (5th ed. 1984).

²⁸ The relevant New York statute states that a "'fortuitous event' means any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party." N.Y. INS. LAW § 1101(a)(2) (McKinney 1985).

²⁹ The New York laws have assessed the degree of fortuity found in contracts of warranty upon the ability of the provider of the warranty to inspect or adjust the object under warranty so as to exclude chance happenings as much as possible. See 1957 N.Y. Rep. Att'y Gen. 221, 222; see also *Electronic Realty Assocs. v. Lennon*, 404 N.Y.S.2d 283, 287 (Sup. Ct. 1978).

³⁰ The "fortuitous events" test has been modified in several jurisdictions and may now be more appropriately referred to as a "service-indemnity" distinction. See *infra* notes 100-19 and accompanying text.

³¹ 77 C.J.S. *Sales* § 302(b) (1945); FTC Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act, 16 C.F.R. § 700.11(b) (1992); see also *Guaranteed Warranty Corp. v. State ex rel. Humphrey*, 533 P.2d 87, 90 (Ariz. Ct. App. 1975).

³² See *Humphrey*, 533 P.2d at 87; *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437 (Ohio 1941); see also U.C.C. § 2-313(1) (1990); 12 Kan. Op. Att'y Gen. 78-68 (1978).

³³ See *Humphrey*, 533 P.2d at 90 (citing U.C.C. § 2-229 (Warranty of Title), § 2-321 (Implied Warranty - Merchantability), § 2-330 (Express Warranties)).

³⁴ U.C.C. § 2-313 cmt. 1.

which lack buyer-seller privity and wherein the agreement is limited in scope of liability to the repair, replacement, or reimbursement of such costs resulting from damages arising only from product defects, the agreement does not necessarily meet either the definitions of insurance or warranty. Such an agreement could not unequivocally be characterized as an insurance contract because the scope of the risk assumed under the contract is limited to unfortuitous events (defects inherent in the product); and further, the agreement could not clearly be labeled a warranty as no buyer-seller privity of contract exists between the parties. This gap has been recognized by the federal government which has promulgated specific regulations for such agreements under the Magnuson-Moss Warranty Act.³⁵

C. Federal Regulation and the Magnuson-Moss Warranty Act

The Magnuson-Moss legislation was enacted with the intent to protect consumers from abusive and unfair warranty agreements.³⁶ By the 1970s, it was evident to Congress that many warrantors failed to properly disclose essential and key terms of coverage within warranty agreements. As a consumer protection device, the Act places a disclosure requirement upon all sellers who provide warranties.³⁷ Further, the Act bars any unfair limitations and qualifications upon the warranty coverage provided by the seller; in so doing, the Act attempts to increase the bargaining power of the consumer relative to that of the warrantor.³⁸

The Magnuson-Moss Act imposes strict standards upon warrantors.³⁹ However, the Act fails to provide an equivalent comprehensive regulatory scheme for product guarantees provided by third parties. Under Magnuson-Moss, the third party providers of product guarantees are not expressly prohibited from placing harsh restrictions or requirements upon the consumer, whereas warranty consumers are explicitly protected from these types of abusive policy limitations.⁴⁰

Under authority of the Magnuson-Moss Act, the Federal Trade Commission⁴¹ has deemed a "service contract" as one which would meet the

³⁵ 15 U.S.C. § 2301 (1988).

³⁶ The Magnuson-Moss Warranty Act is codified at 15 U.S.C. §§ 2301-12 (1988).

³⁷ *Id.* § 2302.

³⁸ Kathleen F. Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 80 (1978); 15 U.S.C. § 2308 (1988).

³⁹ 15 U.S.C. §§ 2302-04 (1988).

⁴⁰ *Id.*

⁴¹ FTC Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act, 16 C.F.R. § 700.11(c) (1992).

definition of a warranty⁴² but for the agreement's failure to satisfy the basis of the bargain test.⁴³ Such service contracts are subject to Magnuson-Moss only if they are not regulated as insurance under state law and only if the agreement is adjudicated as lacking the requirements of a warranty. As a result, there is no federal preemption in the regulation of service contracts. State law must first determine the character of the agreement before Magnuson-Moss is triggered.⁴⁴ However, even when Magnuson-Moss is applicable, the requirements placed upon service contracts are not as comprehensive as those placed upon warranty agreements. The pragmatic result is that once a third party guarantee is deemed not to be an insurance agreement, Magnuson-Moss may label the agreement as a service contract.⁴⁵

IV. *GRIFFIN SYSTEMS, INC. v. OHIO DEPARTMENT OF INSURANCE*

A. *The Facts*

In 1991, the Supreme Court of Ohio addressed the issue of characterizing a third party product guarantee as either an insurance agreement or a warranty contract. Upon the receipt of numerous complaints, the Ohio Department of Insurance ("ODI") began to investigate the activities of Griffin Systems, Inc. ("Griffin") and the Vehicle Protection Plans which Griffin was offering to new car owners. The ODI had received notice that Griffin was failing to pay its obligations under the agreements which it had issued to vehicle owners. Research by ODI revealed that Griffin neither sold nor manufactured any of the vehicles which it guaranteed, nor did it perform the required maintenance and repair upon the vehicles itself.⁴⁶ The plan offered by Griffin guaranteed to replace defective parts in the automobile; any service which the automobile required must have been obtained from an independent mechanic and the cost of such service would then be repaid to the automobile owner.⁴⁷ The Vehicle

⁴² As defined under 15 U.S.C. § 2301(6)(A), (B) (1988).

⁴³ See *id.* § 2301(8).

⁴⁴ 16 C.F.R. § 700.11(a) (1992).

⁴⁵ See generally 16 C.F.R. § 700.11 (the regulations put forward by the Federal Trade Commission imply that a service contract not regulated by the state as insurance must meet, at a minimum, the regulations imposed by Magnuson-Moss).

⁴⁶ The term "guarantee" will be used in referring to Griffin's Vehicle Protection Plan. This will allow us to avoid the labeling of the agreement as either a warranty or insurance contract prior to a full analysis.

⁴⁷ Griffin Sys., Inc. v. Ohio Dep't of Ins., No. 89AP-608, 1990 WL 80654 at *2 (Ohio Ct. App. June 14, 1990).

Protection Plan specifically excluded liability for acts of God and any failure by the consumer to perform maintenance as required by the vehicle's manual.⁴⁸

The ODI conducted a review of Griffin and found the product guarantee agreements offered by Griffin to constitute insurance rather than warranty agreements based upon Griffin's lack of buyer-seller privity with the consumers.⁴⁹ The Ohio trial court reversed this administrative finding by ODI and found, as a matter of law, that the contract was a warranty agreement due to the limited risk assumed by Griffin. On appeal, the Ohio Court of Appeals reversed and held that the contract was properly regulated as insurance under state law.⁵⁰

B. *An Analysis of the Griffin Decision*

In a 4-3 decision, the Supreme Court of Ohio reversed the court of appeals and held the Griffin Plan to constitute a warranty agreement. The court reviewed its holdings in both *State ex rel. Duffy v. Western Auto Supply Co.*⁵¹ and *State ex rel. Herbert v. Standard Oil Co.*⁵² and held that as to consumer goods, an insurance contract "is one that promises to cover losses or damages over and above, or unrelated to, defects within the product itself."⁵³

In reviewing the agreement offered by Griffin, the court was satisfied that losses unrelated to the defects within the product itself were excluded from the coverage which Griffin provided, and thus deemed the contract to be a warranty pursuant to both the *Duffy* and *Herbert* holdings.⁵⁴ The ODI unsuccessfully argued that the failure of a buyer-seller privity should disqualify the Griffin agreements as warranties. Specifically, ODI pointed to Griffin's status as a third party product guarantor and argued that Griffin's product guarantee agreement did not induce the purchase of the products in question.⁵⁵ The majority was unpersuaded by the distinctions which ODI had presented. In fact, the court implied that the lack of a buyer-seller privity was of no significance by stating that "the distinction made in this vein was of no apparent consequence in *Duffy*, . . . inasmuch [sic] as it was the *seller* of the

⁴⁸ *Id.* at *3.

⁴⁹ *Id.* at *1; see also OHIO REV. CODE ANN. § 3905.42 (Anderson 1989).

⁵⁰ *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, No. 89AP-608, 1990 WL 80654 (Ohio Ct. App. June 14, 1990); OHIO REV. CODE ANN. § 3905.42 (Baldwin 1991).

⁵¹ 16 N.E.2d 256 (Ohio 1938).

⁵² 35 N.E.2d 437 (Ohio 1941).

⁵³ *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, 575 N.E.2d 803, 806-07 (Ohio 1991).

⁵⁴ *Id.* at 807.

⁵⁵ *Id.*

product therein who issued the 'warranty' that this court found to be a contract substantially amounting to insurance."⁵⁶ The *Griffin* majority went on to hold:

Under the rule of law announced in both *Duffy* and *Herbert*, it is clear that warranties that cover only defects within the product itself are properly characterized as warranties (as was the case in *Herbert* . . .), whereas warranties promising to cover damages or losses unrelated to defects within the product itself are, by definition, contracts substantially amounting to insurance (as was the case in *Duffy* . . .).⁵⁷

The court labeled this rationale as the "substance-of-the-contract" test.⁵⁸

The court's reasoning for rejecting the buyer-seller privity requirement for warranty agreements is arguably misplaced. The majority holds that in today's markets consumers are not persuaded to buy a product based upon the availability of an extended warranty agreement which may be purchased at additional cost.⁵⁹ Further, the court implies that it would be unfair to permit only manufacturers or sellers of products to offer extended warranties "while independent third parties would be subject to insurance regulations even if the [product guarantees offered] specifically excluded losses or damages unrelated to defects in the product."⁶⁰

V. INSURANCE V. WARRANTY—THE WAY IT WAS BEFORE *GRIFFIN*

The Ohio Supreme Court has often been cited as a leading jurisdiction in the ongoing struggle to distinguish insurance agreements from warranty contracts.⁶¹ In *Duffy*, the Ohio Supreme Court held that an agreement provided in connection with the sale of tires guaranteeing "against 'blowouts, cuts, bruises, rimcuts, underinflation, wheels out of alignment, faulty brakes or other road hazards.'"⁶² could be regulated as insurance. The *Duffy* court expressly held:

[Insurance] is a contract "to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed. . . ."

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 808.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See Annotation, *What Constitutes Insurance*, 119 A.L.R. 1241 (1939); see also 44 C.J.S. *Insurance* § 1(b) (1945).

⁶² *State ex rel. Duffy v. Western Auto Supply Co.*, 16 N.E.2d 256 (Ohio 1938) (syllabus at para. 4).

A warranty promises indemnity against defects in the article sold, while insurance indemnifies against loss or damage resulting from *perils outside of and unrelated to defects in the article itself*.⁶³

Duffy did qualify its holding with a rather important distinction. The court stated that “[t]he fact that such [a] contract of indemnity is made only with the purchaser of the indemnitor’s product *does not* relieve the transaction of its insurance character.”⁶⁴ This language restricts a seller’s ability to provide overly broad guarantees which indemnify against events unrelated to defects in the product itself. *Duffy* thus acknowledges that even where a buyer-seller privity does exist, a *high degree of risk* assumed in the guarantee contract by the seller may result in a contract amounting to insurance.⁶⁵ The court in *Duffy* thus indicated that the existence of buyer-seller privity alone may not be enough to escape the clutches of insurance regulation.

The *Duffy* court’s definition of insurance was later applied in *Herbert* wherein the Ohio Supreme Court held that an agreement to indemnify a purchaser of automobile tires for defects which arose solely from imperfections in the tires themselves was not insurance, but rather a representation to the purchaser that the product is one of quality.⁶⁶ This holding in *Herbert* is in agreement with the approach taken by the U.C.C. which endorses the view that when a product guarantee agreement is part and parcel to the sale of the product and used to induce the sale, such an agreement is to be characterized as one of warranty.⁶⁷

In *Rogers v. Toni Home Permanent Co.*⁶⁸ it was held that an express warranty was “an affirmation of fact by the seller of a product or commodity to induce the purchase thereof and *on which affirmation the buyer relies in making the purchase*.”⁶⁹ The *Rogers* definition of warranty conforms to that found in the federal Magnuson-Moss Act which defines a written warranty as a promise that “becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of [the] product.”⁷⁰ In *Rogers*, it is evident that Ohio clearly followed the U.C.C. by imposing a buyer-seller privity

⁶³ *Id.* at 259 (emphasis added) (citations omitted).

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Id.*

⁶⁶ *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 438 (Ohio 1941) (syllabus at para. 5).

⁶⁷ U.C.C. § 2-312 (Warranty of Title), § 2-313 (Express Warranties), § 2-314 (Implied Warranty - Merchantability), § 2-315 (Implied Warranty - Fitness), § 2-318 (Third Party Beneficiaries) (1989).

⁶⁸ 147 N.E.2d 612 (Ohio 1958).

⁶⁹ *Id.* at 615 (emphasis added).

⁷⁰ 15 U.S.C. § 2301(6) (1988).

requirement for product warranty agreements.⁷¹ The fact that "[a] warranty is ordinarily an obligation assumed by a seller of goods"⁷² has been well received by courts in an attempt to protect the public from surrendering money in exchange for worthless product guarantee policies with little or no financial backing.⁷³ This rationale is supported in *Guaranteed Warranty Corp. v. State of Arizona ex rel. Millard Humphrey*⁷⁴ where an Arizona appellate court held that a product guarantee agreement, wherein the guarantor neither sold nor manufactured television picture tubes, but had agreed to replace defective tubes upon payment of an annual premium, rose to the level of insurance since no buyer-seller privity existed between the consumer and the guarantor.⁷⁵

In *Griffin Systems, Inc. v. Washburn*,⁷⁶ a consumer indemnity agreement offered by Griffin and substantially similar to that offered in Ohio, was reviewed by an Illinois appellate court in an attempt to characterize the contract as either one of warranty or insurance. The *Washburn* court held that Griffin did not achieve the status of warrantor because it did not manufacture or sell the automobile parts which it agreed to repair or replace.⁷⁷ The foregoing holdings support the proposition that a third party product guarantor is to be characterized as an insurer when the guarantor has no buyer-seller privity of contract with the consumer, and when the guarantor did not enter into the product guarantee agreement as a basis of bargain for the sale of the goods protected.

In an attempt to foster a more refined distinction between insurance and warranty agreements, several jurisdictions have distinguished the two terms based upon the contractual intent of the guarantor. In attempting to determine if a product guarantee contract rises to the level of insurance, the California Supreme Court in *Transportation Guarantee Co. v. Jellins*⁷⁸ held that in "looking at the [agreement] as a whole, [if] 'service' rather than 'indemnity' is its principal object"⁷⁹ the agreement is not one of insurance. Specifically, the *Jellins* court held that a third party product guarantee contract promising automobile repair was not an insurance agreement where the guarantor's intent was to service the product.⁸⁰ The service contract in *Jellins* required the guarantor to provide garage space, scheduled maintenance, and to repair the

⁷¹ See *supra* note 34 and accompanying text.

⁷² *Mein v. United States Car Testing Co.*, 184 N.E.2d 489, 493 (Ohio Ct. App. 1961).

⁷³ *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 440 (Ohio 1941).

⁷⁴ 533 P.2d 87 (Ariz. Ct. App. 1975).

⁷⁵ *Id.* at 90.

⁷⁶ 505 N.E.2d 1121 (Ill. App. Ct. 1987).

⁷⁷ *Id.* at 1124.

⁷⁸ 174 P.2d 625 (Cal. 1946).

⁷⁹ *Id.* at 629.

⁸⁰ *Id.*

auto if required. Most importantly, these services were to be performed by the guarantor.⁸¹

Duffy and *Jellins* present two rationales which seem to merge. *Duffy* clarifies that although a small element of risk assumption in a product guarantee agreement should not alone be controlling in determining the character of such an agreement, an overwhelming assumption of risk guaranteeing indemnification of losses resulting even from fortuitous events certainly may prove dispositive of a contract's insurance character, even when buyer-seller privity exists between the guarantor and consumer.⁸² The *Jellins* court appears to develop the *Duffy* theme one step further. The holding in *Jellins* implies that a product guarantee agreement, wherein the parties lack any buyer-seller privity of contract and the guarantor offers indemnity for the maintenance, repair, or replacement of a consumer product, may still elude insurance characterization if the guarantor's *intent* was to service the product itself. However, when the true intent of the product guarantee is to financially indemnify losses by simply reimbursing the product owner for maintenance, repair, and replacement costs, the contract should be characterized as one of insurance and regulated under state insurance law.⁸³ As a result, *Jellins* closes the definitional gap between insurance and warranty contracts by allowing guarantors who perform service in connection with a product guarantee agreement to be treated as warrantors under state law. If the purpose of the agreement is to repair and maintain the product, the contract is excluded from insurance regulation. However, if the agreement merely provides indemnity, or a deep pocket for maintenance, repair, and replacement undertaken by others, the contract is deemed as one of insurance. This distinction is referred to as the service-indemnity test.

The service-indemnity test forces courts to draw fine distinctions in guarantee agreements. In *Jim Click Ford, Inc. v. City of Tucson*⁸⁴ an Arizona court held that a contract which was termed a service contract and provided for automobile repairs at the guarantor's dealership was an insurance agreement. The court in *Jim Click Ford* distinguished its decision from that of the *Jellins* court by holding that the *Jellins* contract provided for garage space, routine maintenance, and repairs, whereas the *Jim Click Ford* contract required no regular maintenance to be performed by the guarantor.⁸⁵ Moreover, *Jim Click Ford* held that merely requiring the consumer to produce evidence that the vehicle had been properly maintained by others, as required by the guarantee

⁸¹ *Id.* at 630-31.

⁸² *State ex rel. Duffy v. Western Auto Supply Co.*, 16 N.E.2d 256, 259 (Ohio 1938).

⁸³ *Jellins*, 174 P.2d at 629.

⁸⁴ 739 P.2d 1365 (Ariz. Ct. App. 1987).

⁸⁵ *Id.* at 1367-68.

agreement, was not sufficient to create a true service contract.⁸⁶ Thus, the Arizona court based its decision upon the degree of service which the product guarantor provided. In so holding, the Arizona court emphasized the requirement that under the service-indemnity test any service performed must be done by the guarantor. The court refused to expand the definition of warranty to include agreements which placed the responsibility of product maintenance and repair upon individuals other than the guarantor itself. The reasoning behind such a holding is based upon the rationale that shifting the responsibility of maintenance and repair to others reduces the guarantor's control over the product and thus creates a greater risk under the agreement. The result in *Jim Click Ford* was a holding which reached a balance between: 1) the need to exclude coverage of fortuitous events from warranty agreements, and 2) the necessity of requiring the guarantor to perform a minimum level of service under the agreement.

VI. ELIMINATING PRIVITY REQUIREMENTS IN WARRANTY CONTRACTS: A JUSTIFIED BASIS IN LAW?

The majority's holding in *Griffin* places much emphasis upon the *Duffy* and *Herbert* decisions in support of its conclusion. However, no reading of *Duffy* or *Herbert* in the fifty year history of those decisions⁸⁷ has resulted in a holding approaching that which the *Griffin* majority has recently rendered. *Griffin*'s refusal to acknowledge the significance of a buyer-seller privity in warranty agreements will undoubtedly have repercussions in the consumer world.

The belief that *Duffy* and *Herbert* intended the existence of a contract of sale as a prerequisite to a valid warranty agreement has significant support.⁸⁸ Indeed, the theory that a warranty agreement must become a basis of the bargain in a contract of sale has been adopted by the U.C.C. and federal regulations.⁸⁹ In establishing the importance of the basis of the bargain requirement for warranty contracts the federal Magnuson-Moss Act goes so far as to create the category of 'service contract' by defining such a contract as

⁸⁶ *Id.* at 1368; see also *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tex. Ct. App. 1985).

⁸⁷ *State ex rel. Duffy v. Western Auto Supply Co.* was decided in 1938 and *State ex rel. Herbert v. Standard Oil Co.* was decided in 1941.

⁸⁸ See 44 C.J.S. *Insurance* § 1(b) (1945); see also Annotation, *supra* note 61.

⁸⁹ U.C.C. § 2-312 (Warranty of Title), § 2-313 (Express Warranties), § 2-314 (Implied Warranty - Merchantability), § 2-315 (Implied Warranty - Fitness), § 2-318 (Third Party Beneficiaries) (1989); FTC Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act, 16 C.F.R. 700.11 (1992).

"[a]n agreement which would meet the definition of a written warranty . . . *but for its failure to satisfy the basis of the bargain test.*"⁹⁰

The *Griffin* court, in its search for a bright line test, has dangerously expanded the *Duffy* holding. In *Duffy*, the court held that even a seller of goods would be deemed as engaging in the business of insurance if it offered excessively broad indemnity agreements to its customers.⁹¹ In *Griffin*, the majority held that *Duffy* placed no import upon the status of the parties entering into warranty contracts.⁹² The majority's determination that the lack of a buyer-seller privity between the parties involved in a guarantee contract is inconsequential seems to be based upon Justice Matthias' statement in *Duffy* that: "[t]he fact that such contract of indemnity is made only with the purchaser of the indemnitor's product does not relieve the transaction of its insurance character."⁹³ The *Griffin* majority may well have misinterpreted the foregoing language in *Duffy*.

When read as a whole, Justice Matthias' preceding statement in *Duffy* simply restricts a seller's ability to provide overly broad guarantees which indemnify against events unrelated to defects in the product itself. The *Duffy* opinion does not attempt to convince its reader that the buyer-seller privity requirement is "inconsequential" in determining the character of a product guarantee agreement, as the *Griffin* opinion believes.⁹⁴ Moreover, in *Duffy* Justice Matthias expressly held that "[i]f the contracts of indemnity involved here are not violative of the insurance laws, then every company may, *in consideration of the purchase price paid therefor*, furnish its product and also undertake to insure it against all hazards for a specified period."⁹⁵ Furthermore, Justice Matthias held that, per state statute: "[a]ny affirmation of fact or any promise *by the seller* relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon."⁹⁶ As a result, *Griffin's* reasoning that the *Duffy* court believed the buyer-seller privity to be inconsequential in determining whether a contract is to be characterized as one of warranty or insurance seems unfounded. It is unlikely that the *Duffy* court intended to extinguish the buyer-seller privity requirement in warranty agreements. Quite significantly, the Ohio legislature placed much emphasis upon the relevance of buyer-seller privity in warranty agreements; it

⁹⁰ 16 C.F.R. § 700.11(c) (1992) (emphasis added); *see also* 15 U.S.C. § 2301(6) (1988).

⁹¹ *State ex rel. Duffy v. Western Auto Supply Co.*, 16 N.E.2d 256, 259 (Ohio 1938).

⁹² *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, 575 N.E.2d 803, 807-08 (Ohio 1991).

⁹³ *Duffy*, 16 N.E.2d at 259.

⁹⁴ *Griffin*, 575 N.E.2d at 807-08.

⁹⁵ *Duffy*, 16 N.E.2d at 259 (emphasis added).

⁹⁶ *Id.* (emphasis added); OHIO GEN. CODE § 8392 (1935).

would be illogical to believe that *Duffy* found the legislatively promulgated definition of warranty inconsequential as to the requirement that a warranty contract be a promise made by the seller of a product.⁹⁷

The decision in *Duffy v. Western Auto Supply Co.* appears to be in accord with the Ohio Supreme Court's decision in *Herbert v. Standard Oil Co.* and inconsistent with the holding adopted by Justice Sweeney in *Griffin v. Ohio Department of Insurance*. *Duffy* simply reasons that even parties in buyer-seller privity may be held to have entered into an insurance rather than a warranty agreement. Clearly, the *Duffy* court intended to demonstrate that regardless of a buyer-seller privity relationship, an overwhelming assumption of risk by the guarantor in a product guarantee agreement may, nonetheless, result in the characterization of the guarantee agreement as an insurance contract.⁹⁸ This rationale is further supported in *Herbert* wherein Justice Zimmerman held that the point at which a seller of goods may be deemed to be involved in the business of insurance is based upon the content of the guarantee contract which the seller provides. Specifically, the *Herbert* court opined that warranty agreements which represent the articles sold to be so well manufactured that they will give satisfactory service under ordinary use, but which expressly exclude defects not in the goods themselves, need not be held to constitute insurance contracts.⁹⁹ *Herbert* did not attempt to inconsequentialize the need for buyer-seller privity in the characterization of product guarantee agreements, but rather to emphasize that the scope of coverage within a product guarantee agreement is a significant factor in characterizing the contract as either one of warranty or insurance.¹⁰⁰

VII. GRIFFIN'S "SUBSTANCE-OF-THE-CONTRACT" TEST: AN INFERIOR ALTERNATIVE TO THE SERVICE -INDEMNITY DISTINCTION

The *Griffin* court looked to the substance of coverage promised by the guarantor in characterizing the agreement as one of warranty.¹⁰¹ This new substance-of-the-contract¹⁰² test was explained by Justice Sweeney in one sentence: "[W]arranties that cover only defects within the product itself are properly characterized as warranties (as was the case in *Herbert*, *supra*), whereas warranties promising to cover damages or losses unrelated to defects

⁹⁷ OHIO GEN. CODE § 8392 (1935).

⁹⁸ *Duffy*, 16 N.E.2d at 259.

⁹⁹ *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 438 (Ohio 1941) (syllabus at para. 5).

¹⁰⁰ Notably this test has been codified within the New York state insurance code. N.Y. INS. LAW § 1101 (MCKINNEY 1985); *see also* Kane, *supra* note 18, at 48.

¹⁰¹ *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, 575 N.E.2d 803, 807-08 (Ohio 1991).

¹⁰² *Id.*

within the product itself are, by definition, contracts substantially amounting to insurance”¹⁰³

The *Griffin* court, in developing its substance-of-the-contract approach, cited to *Mein v. United States Car Co.* as a precursor to its new test.¹⁰⁴ In *Mein* the guarantor, who lacked any buyer-seller privity with the consumer, offered a maintenance contract to repair and maintain the automobile which was the subject of the agreement.¹⁰⁵ The *Mein* agreement set forth a list of parts covered under the scope of the contract and further excluded coverage of all parts not listed.¹⁰⁶ However, the guarantor failed to expressly limit its liability to inherent product defects. *Mein* specifically held that the guarantee agreement was “not against defects in any articles sold, but against loss or damage resulting from perils outside and unrelated to such defects.”¹⁰⁷ Thus, the court found that the guarantor’s failure to expressly limit its liability to product defects was determinative of an insurance agreement. *Mein* draws significantly upon the *Duffy* decision and places emphasis not only upon the terms of the agreement, but also upon the existence of a buyer-seller privity between the parties.¹⁰⁸ By holding that “[a] warranty is ordinarily an obligation assumed by a seller of goods . . . [and that] authority has been cited to the effect that there can be no warranty without a sale” it may be argued that the *Mein* court supports a presumption of insurance where the guarantor is neither a seller nor manufacturer of the product guaranteed.¹⁰⁹ The *Mein* decision placed greater restrictions upon third party guarantors since it strictly held that all liability not expressly excluded would be assumed to be included within the scope of the guarantee, regardless of normal or abnormal wear and tear.¹¹⁰ *Griffin* has refused to read *Mein* in its totality but rather has chosen to address only language within the case discussing the importance of limiting the product guarantor’s liability to inherent defects within the product. Thus, *Griffin* has failed to distinguish language within the *Mein* holding which supports the proposition that there “may be no warranty without a sale.”¹¹¹ Arguably, the *Mein* court would have ruled the Griffin Vehicle Protection Plan to be a contract substantially amounting to insurance.

¹⁰³ *Id.* at 807.

¹⁰⁴ *Id.* at 808.

¹⁰⁵ *Mein v. United States Car Testing Co.*, 184 N.E.2d 489, 491 (Ohio Ct. App. 1961).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 493.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

The holdings in *Transportation Guarantee Co. v. Jellins* and *Jim Click Ford, Inc. v. City of Tucson* should have played significant roles in distinguishing Griffin's product guarantee as either an insurance agreement or a warranty contract. The courts in *Jellins* and *Jim Click Ford* support the theory that where the intent of a product guarantee contract is to provide product service rather than merely reimburse the cost of such service, the guarantor is not engaged in the business of providing insurance.¹¹² The significant requirement implied by the two courts was that the guarantor must itself service or maintain the product rather than delegate such responsibility.¹¹³

The service-indemnity distinction is more plausible than the substance-of-the-contract test promulgated in *Griffin*. *Griffin's* unrealistic substance of the contract test characterizes product guarantees based predominantly upon the scope of the risk assumed by the guarantor. Thus, under *Griffin*, product guarantee agreements which indemnify inherent product defects are characterized as contracts of warranty, and guarantees which indemnify costs associated with product malfunction based upon fortuitous events are labeled as insurance contracts regardless of the indemnitor's relationship to the indemnitee.¹¹⁴ It is far more logical to characterize product guarantees as warranty contracts when the warrantor's intent is to service the product, and to characterize guarantee agreements as insurance contracts when the guarantor merely intends to reimburse and indemnify the costs associated with servicing or replacing the product.¹¹⁵ Such is the distinction put forth under the service-indemnity test.

The idea that the warrantor must provide something more than a pocket-book to pay for maintenance, repair, or replacement of a product guaranteed is essential to the service-indemnity distinction. If the requirement to reimburse the consumer for product maintenance and repair was the only demand of a warranty agreement the result would be similar to an insurance policy which simply offers reimbursement upon the happening of fortuitous events.¹¹⁶ As a result, the ability of the guarantor to control the occurrence of fortuitous events should be a key factor in distinguishing agreements of warranty from those of insurance.¹¹⁷ The ability of the warrantor to have control over the product, as typically is the case where the warrantor either manufactures or services the

¹¹² *Transportation Guarantee v. Jellins*, 174 P.2d 625, 631 (Cal. 1946); *Jim Click Ford, Inc. v. City of Tucson*, 739 P.2d 1365, 1367-68 (Ariz. Ct. App. 1987).

¹¹³ *Jellins*, 174 P.2d at 631; *Jim Click Ford*, 739 P.2d at 1367-68; *State ex rel. Herbert v. Standard Oil Co.*, 35 N.E.2d 437, 441 (Ohio 1941).

¹¹⁴ *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, 575 N.E.2d 803, 807-08 (Ohio 1991).

¹¹⁵ See 15 U.S.C. § 2301(8) (1988); see also FTC Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act, 16 C.F.R. § 700.11(c) (1992).

¹¹⁶ See Kane, *supra* note 18, at 48.

¹¹⁷ N.Y. INS. LAW § 1101(a) (McKinney 1985).

product itself, will arguably reduce the risk assumed by the party guaranteeing the product.¹¹⁸

The *Griffin* test has placed significantly all product guarantors within the reach of warrantor status. With careful contractual drafting, it is possible to provide indemnity only with respect to defects inherent in the product itself.¹¹⁹ It is difficult to discern the court's intent in rejecting the service-indemnity distinction. It is possible that the court wished to step in the direction of de-regulation. However, as one may suspect, the price to be paid will undoubtedly place a heavy burden upon consumers.

An unequivocal requirement of buyer-seller privity for product warranty contracts would have provided an intelligent move toward the protection of consumers in the extraneous warranty market. The result of requiring a buyer-seller privity for warranty agreements permits the consumer to seek protection behind the seller's manufacturing or retail enterprise. The product guarantor's enterprise is essentially a security interest upon which the consumer may rely in purchasing the seller's goods. However, when the guarantee is offered from a corporation whose assets are mostly liquid, and whose business is predominantly to provide guarantee agreements, little tangible security exists for the consumer. The *Griffin* court has failed to consider the legislature's desire to regulate the insurance and risk motivated markets. The Ohio Supreme Court's failure to address public policy issues exemplifies the court's oversight of legislative intent. Firms marketing product guarantees within Ohio now possesses the ability to operate what is essentially an unregulated insurance enterprise, with no requirements for reserves or financial disclosures, as would be mandated under Ohio insurance law.

VIII. CONCLUSION

The need to characterize guarantee agreements as warranty or insurance for the purpose of regulation has failed to produce a uniformly accepted test. Most courts which have successfully addressed this definitional problem have never lost sight of the true policy behind their interpretative task: the protection of consumers. The service-indemnity test has been one of the most functional advances in the ongoing struggle to classify third party product guarantees as either an insurance or warranty agreement.

The Ohio Supreme Court has taken two regressive steps in the struggle to achieve a definitional balance between insurance and warranty contracts in the realm of product guarantees. First, *Griffin's* rejection of the privity of contract requirement for express warranty agreements permits any who wish to warrant

¹¹⁸ Kane, *supra* note 18, at 49.

¹¹⁹ *Griffin Sys., Inc. v. Ohio Dep't of Ins.*, 575 N.E.2d 803, 807-08 (Ohio 1991).

durable goods to do so. The effective result of such a holding is not difficult to hypothesize: warrantors with no ability to control their risks in the products which they warrant and no requirements to maintain liquidity to cover potential claims will enter the market and provide significant amounts of risk-bearing agreements which they will not be able to perform. Such a holding directly opposes the intent of consumer protection legislation.

Second, the *Griffin* majority has attempted to simplify the definitional dilemma facing the characterization of product guarantee contracts by holding that agreements which indemnify for defects in the product itself are not contracts of insurance. Here the court embraces an unrealistic assumption: that indemnification for product defects in our consumer oriented society is not a significant risk-bearing activity. However, in a technologically advanced society where repairs or maintenance upon complex products require significant skill and labor, the potential for large claims becomes a significant risk. Much like homeowners' insurance contracts which charge a premium for bearing a potential risk of replacing products which are stolen, the provider of a product guarantee imposes a fee upon the purchaser of the agreement for bearing similar potential risk. More importantly, when a corporation such as Griffin, whose sole business is to provide product guarantees, is held not to engage in an activity "substantially amounting to insurance,"¹²⁰ and thus is not required to retain a reserve fund or to make public its financial status, the simplistic definition propounded by the *Griffin* court becomes even more questionable. As a public policy concern, the fact that many risk-bearing companies lack durable assets in which a security interest may be taken emphasizes the necessity of regulation. In *Griffin*, the provider of the product guarantee lacked durable assets because the sole activity of the corporation was to solicit risk-bearing contracts. As a result, a failure by Griffin to maintain solvency places holders of service contracts in the position of an unsecured creditor. Such were the dangers that induced the national development of insurance regulatory schemes.

The influx of contracts amounting to insurance within our consumer society are undoubtedly risk-spreading devices. The Ohio decision in *Griffin* has approached the insurance-warranty definitional dilemma and produced a theoretical answer. However, the court failed to acknowledge the pragmatic effects of its decision and refused to adhere to the legislative intent behind the law that it interpreted. The Ohio Supreme Court's holding in *Griffin* should place significant pressure upon the Ohio legislature to promulgate a definition of insurance which will re-embrace the state's regulatory aim of protecting consumers from unfair, unsecured, and abusive guarantee agreements.

Keyvan Samini

¹²⁰ OHIO REV. CODE ANN. § 3905.42 (Anderson 1989).